UNITED STATES OF AMERICA

BEFORE

THE NATIONAL LABOR RELATIONS BOARD,
REGION 28

NV Energy, Inc.,	)	
	)	
Employer	)	
	)	28 UC 243
	)	
	)	
	)	OPPOSITION
	)	OF PETITIONER TO
INTERNATIONAL BROTHERHOOD OF	)	SPECIAL APPEAL OF
ELECTRICAL WORKERS, AFL-CIO,	)	DENIAL OF MOTION
LOCAL 396	)	FOR RECONSIDERATION
Petitioner	)	OF DENIAL OF STAY
	)	

The Company has filed a "Special Appeal" of the Board's decision, entered through its Associate Executive Secretary, denying the Company's Motion For Reconsideration of the Board's Denial of its previously filed Motion to Stay the Regional Director's Decision and Order. At the heart of its "special appeal" is the Regional Director's decision and order, pertaining to a UC petition filed January 26, 2009, adding 14 positions to the 1150 person bargaining unit employees the Union presently represents at the company. The positions in question exist because NVE hired new employees to operate, maintain and stock materials and supplies at a generating plant it acquired in October, 2008. They include the plant operator, maintenance specialist and materialman/warehouseman positions. The newly hired employees were hired directly by

NVE and assigned to work at the Higgins Generating Plant in Clark County, Nevada. They perform the same, or substantially similar, work as existing employees of the employer working in Clark County, all of which are bargaining unit under the present CBA. The CBA clearly establishes terms pertaining to the wages, hours and working conditions which should have been applied to the employees from their respective dates of hire[1]. Emp. Ex. 1. If the Higgins employees are not included in the existing bargaining unit, they will be the only non bargaining unit craft employees employed by NV Energy in Southern Nevada.

The Union recognizes that the Board has broad discretion in governing its affairs, and in determining whether to reconsider a prior decision, whether the decision be its own or that of the AES. The Union's position is that the Board should refuse to consider the "Special Appeal." Alternatively, it should deny the "special appeal" and deny reconsideration of its previous order denying the company a stay. Moreover, if it elects to reconsider, it should once again deny the company's request for a stay.

With respect to the document filed by the company, which it labels a "Special Appeal," the company cites no authority under which its "Special Appeal" can be maintained. It cites no case, no rule of law and no regulation giving it the right to maintain a "special appeal." Essentially, it is not an appeal, but rather, a request for reconsideration of the Board's earlier order denying reconsideration. It is noteworthy that, except where specifically provided for, where appeals are allowed under the regulations,

[1] The Union filed unfair labor practice charges as a result of the company's failure to do so. Those charges are still pending, having been deferred for further consideration by the Board at a later date.

such as Regulation 102.26, the party seeking to appeal must first obtain permission to lodge its appeal. The company did not obtain advance permission. Thus, while the company challenges the propriety of the actions taken by the AES, in denying its Request For Reconsideration, claiming he did not have the right to determine that its earlier Request For Reconsideration was untimely, the company is without authority to file the appeal it is now requesting be considered. Rules and regulations are designed to assure the orderly administration of agency proceedings, not to be employed as tools to gain unfair advantage through repetitive filing of the same request using different names and ploys. The original Request For Stay of Proceedings was properly denied as was the determination made by the AES denying the belated Request For Reconsideration. Taken together, this preserves orderly administration and promotes judicial economy. The matter can not go on and on with motion after motion and appeal after appeal. The Board ruled, and its ruling should be abided by.

In requesting a stay in the first instance, the company made the same basic arguments as it is now raising. The Board determined that a stay was not appropriate under the circumstances. Reconsideration is appropriate only where the earlier ruling is based upon an error of law or new facts have come to light which, by the exercise of due diligence could not have been advanced previously. In determining not to stay proceedings the Board did not err as a matter of law. It made a discretionary determination that issuance of a stay was not appropriate. No new facts have occurred or been alleged. The company raises nothing that has not already been considered, and circumstances have not changed. The company is badgering the Board to change its mind

because it does not like the earlier ruling. It is essentially attempting to re-litigate the issues by filing multiple motions under various different titles, but all on the exact same points. The Company motion raises no compelling reason to justify granting it relief or reconsideration. There is no newly discovered evidence, there is no manifest error of law and there is no intervening change in the law. Essentially, the company wants reconsideration because it "disagrees" with the Board's earlier ruling and claims harm will occur if a stay is not granted[2]. The same argument could be made by every party that does not get a ruling in its favor. As support for the pending request, the company reiterates the same basic points it raised in the initial motion and in the Motion for Reconsideration, using unsupported conclusions and conjecture about the consequence of not entering a stay and even misstating facts[3]. It does not attach evidentiary exhibits or the affidavit of an individual with personal knowledge of the facts. The point is that very single company and every single union can *claim* irreparable harm and a denial of its rights or the rights of affected employees every time the Board rules. If the Board bows to this, reconsiders its prior decisions and stays proceedings based upon the unsupported claims of counsel, it will open Pandora's box to an untold number of requests for reconsideration and "special appeals." Compelling evidence of harm and irreparable

[2] The company's unsupported arguments are: If it agrees with the union, its appeal will be rendered "moot," it would be subject to a charge that it recognizes a union who does not represent the majority of employees, there would be less harm if the status quo were maintained and irreparable harm occur if the status quo is not maintained.

[3] For example, in a footnote, it claims that the employees "expressed absolutely no interest" in being represented by a union. During the hearing, the unrefuted evidence established that at least two of the Higgins workers signed union dues deduction authorization cards. Moreover, union witnesses testified that the Union did not attempt to "organize" the Higgins workers because the Union had already been lead to believe that there would be a voluntary recognition by the company.

damage is one thing. Supposition is another. The Board does not conduct its affairs based upon unsupported conclusions of legal counsel, but only upon proven facts.

The Board has long recognized that stays should only be given in the most compelling of situations. *The fact is that, in most instances, irreparable harm occurs to affected employees and unions as a result of the very type delay the company now wants the Board to impose.* Should a stay be granted, as the matter moves through the system, the employees will be denied the benefits of the CBA, while the employer imposes its will on employees who are left without a bargaining agent. This may well mean that employees are forced to work in unsafe environments, under unfavorable conditions which do not exist at other plants in the same territorial area covered by CBA's[4]. If a stay is imposed, employees may be terminated "at will," while those covered by the CBA can not be terminated except upon "just cause." Covered employees have recourse under the grievance and arbitration mechanism of the CBA, uncovered employees do not. More harm is generated to the employees through entry of a stay than might be suffered through denial. It is for these and other reasons that a stay is not automatically imposed when a ruling is entered, notwithstanding that review is in progress. It is not the employer who suffers from the absence of a stay, it is the employee and the union that suffer by the issuance of a stay. On balance, the rights of the employees and other interested parties are better protected through denial of a stay, as the drafters of Board regulations recognized.

[4] It should be noted that the Union has repeatedly requested access to the Higgins plant to conduct a simple safety inspection. Each time the company denies it access.

Throughout these proceedings, the company has claimed that the Union requested to negotiate with the Company regarding the terms and conditions of employment regarding the accreted employees[5]. This does not accurately reflect what occurred. When the company took over the Silverhawk plant several years ago it hired employees doing the same basic tasks as those at the Higgins plant at issue in this case, under similar circumstances. When it did so, it recognized that the employees were properly part of the existing bargaining unit. As such, it met with the Union to discuss the proper way to merge the newly hired workers into the existing work force. At that time, the parties reworked the plant operator and maintenance specialist classifications so that the positions were properly described, and worked out the details for the workers' incorporation into the existing system. The descriptions and details apply equally to the Higgins situation. See CBA Emp. Ex. 1. Since this has already been accomplished, there is really little left to do. So, although it is technically correct that the Union requested to get together with the company to move forward, *negotiations are not required*. The present CBA clearly sets forth the terms and conditions that pertain to the positions in question. To the extent a meeting is desired, it is for the purpose of assuring that the CBA is properly applied. The Union does not desire to meet to change contract language. It simply wants to meet to assure that the company *properly applies* the CBA and that no employee suffers ill effects as a result of the merging of his/her position; things such as

[5] The Union demanded that the CBA be applied to these employees prior to filing the UC Petition. The company refused. The Union filed unfair labor practice charges as a result. The charges are being held in abeyance by the Board, pending the outcome of the UC proceedings. It has always been the position of the Union that when the company hired the new employees, it was duty bound to apply the CBA (not negotiate anything new). The company's attempt to side step that obligation is what lead to filing the UC Petition.

making sure that proper placement is made for seniority purposes, PTO and vacation schedules are properly accommodated, employee wages are not reduced as a result of the accretion and the like. This would only take a few hours.

The company claims it might "moot" the issues under review by proceeding, and that the Union will claim that it waived the points it is raising in the pending Request for Review. It raised this same point in the motion which was denied. Neither in the original motion, or the motion for reconsideration has it cited legal authority for this novel, but unfounded idea. Moreover, since the crystal ball into which it peered to determine what the Union will and won't claim was not introduced as evidence, the company is once again speculating. Waiver occurs when one knowingly relinquishes a right. In this case, the Decision and Order of the Regional Director is valid and remains in effect. Thus, the company has no right not to proceed. It is compelled by law. So, it is not "knowingly relinquishing" anything. It would appear that it can protect its position by simply pointing out that it reserves its rights and is proceeding only because compelled to do so.

The employees in question should rightfully have been covered under the existing CBA from the day they were hired. Yet, from the outset, the company has denied them proper coverage under the CBA and engaged in dilatory tactics intent on undermining the Union and negating the Union's support amongst employees. Its request for reconsideration is simply another attempt at delay. So let us consider what appears to be the true motive for the company's actions: the company has refused to allow the Union to have access to the employees because it is worried that, through contact with the

employees, the Union will gain even more support and it will be less likely to win should the Board order an election[6]. As pointed out in the Union's Position Statement heretofore filed with respect to the company's Motion For Stay, the company is seeking to make the Board its pawn to gain tactical advantage.

The fact is that there is little likelihood that the company will be successful in challenging the decision of the Regional Director, and, even if it is, no irreparable harm will occur as a result of being required to move forward under the Decision and Order in the interim. In fact, through denying the requested stay, the Board may well save someone's life once the Union is afforded access and can conduct a proper safety assessment. Moreover, it may well protect the job of a worker terminated without just cause, who might then have access to the CBA grievance and arbitration system.

Petitioner requests that the Company's "Special Appeal" be denied.

Respectfully submitted,

FRANCIS J. MORTON, Esq.
FOR IBEW LOCAL 396

[6] The company is still refusing the Union's request for access to the plant to conduct a safety assessment. See affidavit of Jesse Newman attached hereto. Certainly no damage could occur as a result of allowing access. If an unsafe situation exists, it would be identified by union safety inspectors and the company could effect repairs thereby protecting the workers it claims to be so worried about. It simply makes no sense to deny access, unless, of course, the reason access is denied is because the company fears the employees will show even greater support for the union.

The company motion also mentions the Union's request to grieve a matter. The grievance in question is a grievance filed prior to the filing of the UC Petition regarding a safety matter involving an employee. The company refused to proceed on that grievance prior to filing the petition.

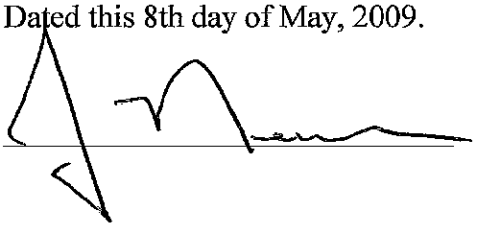
CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury, that on 8th day of May, 2009, he/she served Petitioner's Opposition To Company's "Special Appeal" upon the parties hereto as hereafter set forth:

1. National Labor Relations Board, Executive Secretary, 1099 14th Street, N.W., Washington, C.C. 20570 by electronic filing in accordance with E-Gov on the NLRB website @ www.nlrb.gov.

2. Respondent employer, NV Energy, Inc. by service upon its legal counsel David Lonergran, Esq., Hunton & Williams LLP, 1445 Ross Ave. Ste 3700, Dallas, Texas 75202 by electronic service to dlonergan@hunton.com. A copy was also sent by first class mail, postage prepaid, to the address set forth above.

Dated this 8th day of May, 2009.



AFFIDAVIT

I, Jesse Newman, being duly sworn, state:

1. I have personal knowledge of the matters hereafter set forth and I am competent to testify hereto. I hereby certify, declare and attest that the information hereafter set forth is true and correct.
2. I am the Senior Assistant Business Manager for IBEW Local 396 (396).
3. I am responsible for negotiation of all collective bargaining agreements (CBA's) on behalf of 396 and I am familiar with all existing NVE-396 CBA's.
4. I have been directly and personally involved with the matters pertaining to the Higgins generating plant and the employees hired by NV Energies (NVE) to work at that location.
5. I was present throughout the UC proceedings conducted by the NLRB pertaining to those employees, and testified therein.
6. I am responsible for negotiation and administration of the CBA's pertaining to other NVE locations including those at Reid Gardner and Silverhawk.
7. Several years ago, NVE (then known as Nevada Power Co.) purchased a gas fired generating plant located in Clark County, Nevada. At that time, NVE and 396 met to discuss the integration of the workers employed at Silverhawk into NVE's workforce. The employees were hired directly by NVE. During those discussions, the job descriptions of the plant operator (then known as control operator under existing NVE-396 CBA's) and the maintenance specialist (then known by various different titles under existing CBA's) were rewritten, basically to take in to account operational changes necessitated by the fact that the plant used gas fired turbines rather than coal fired turbines.
8. During 2008, under substantially similar circumstances, NVE purchased the Higgins generating plant. It too has gas fired turbines. At the time of purchase, NVE hired 14 new employees who had previously worked at that plant. Those workers perform the same basic tasks as their counterparts at the Silverhawk plant. The job descriptions in the CBA governing operations at Silverhawk apply equally to the positions at Higgins regarding plant operators and maintenance specialists. No substantive changes are needed thereto. They simply need to be applied in a proper fashion. See Exhibit 1 hereto. The plant operator does the same work as the combined cycle operator - the maintenance specialist does the same work as the production technician.
9. Since NVE hired the employees at Higgins in October 2008, it has

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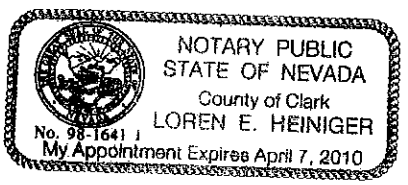
refused to apply the existing CBA to Higgins employees. Moreover, in spite of repeated requests, both prior to and after the UC decision determining that the employees were properly accreted to the existing bargaining unit, NVE has refused to allow 396 safety inspectors access to the Higgins plant to conduct a safety inspection. The latest denial occurred just this week.

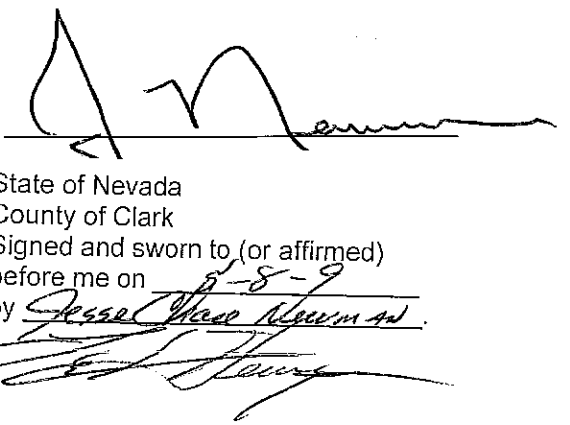
10. 396 filed a grievance against NVE regarding its discipline of one of the affected workers regarding a discipline he was given pertaining to safety issues. This was done prior to filing the UC petition herein. NVE refused, and continues to refuse to process the grievance or meet to resolve it.

11. 396 has not conducted an organizing campaign regarding the Higgins workers, as was pointed out during the UC hearing. There was no need or requirement. It was the understanding of 396 that the employees would be included in the existing bargaining unit and treated accordingly. I am aware of no sentiment amongst employees indicating they do not wish to be represented by 396. The only two employees 396 discussed matters with signed union dues check off authorization cards authorizing NVE to deduct dues from their compensation for remittance to 396. 396 has not been allowed access to any other Higgins employee.

Dated this 8th day of May, 2009,



Notary:



State of Nevada
County of Clark
Signed and sworn to (or affirmed)
before me on 5-8-9
by Jesse Diaz Reynoso.

ATTACHMENT A -- Wages and Employee Classifications

Production Technician
Lead Production Technician
Combined Cycle Operator
Lead Combined Cycle Operator

Cross-functional skills must be obtained with full training provided.

Initially, employees selected for these positions bring basic skill sets and will require training and on-the-job experience to be trained on the technology.

COMBINED CYCLE GENERATION - WAGES					
JOB CODE	JOB TITLE	STEP	02/01/2008 5.00%	02/01/2009 4.50%	02/01/2010 4.25%
6065	Combined Cycle Operator	1	$38.08	$39.80	$41.49
	2nd Six Months	2	$39.22	$40.98	$42.72
6066	Lead Combined Cycle Operator	1	$41.41	$43.28	$45.11
	2nd Six Months	2	$42.66	$44.58	$46.48
6067	Production Technician	1	$38.08	$39.80	$41.49
	2nd Six Months	2	$39.22	$40.98	$42.72
6068	Lead Production Technician	1	$41.41	$43.28	$45.11
	2nd Six Months	2	$42.66	$44.58	$46.48

ATTACHMENT B – Job Descriptions

PRODUCTION TECHNICIAN (6067)

Supports the efficient and cost effective production of electric energy by performing any and all power plant maintenance functions which may include but are not limited to: operating equipment, insulating, painting, lubricating, carpentry; mechanical maintenance and repair or power plant equipment including machining, assembly and disassembly of equipment, investigating and correcting mechanical malfunctions; performing skilled electrical and mechanical work necessary to install, operate and maintain building equipment; perform electrical maintenance including heat tracing, motor replacement, motor overhaul, lighting fixture and lighting circuit maintenance. Maintain high personnel and equipment safety ad environmental compliance standards and practices. Assist in the administration and oversight of contractors of plant maintenance, warehousing activities and building and grounds maintenance. Assist in the development and defining of overall maintenance policies and procedures. Respond quickly to abnormal plant conditions or requirements. Supplement operations by performing basic operations as trained. Employees will perform any and all tasks for which they are properly trained and can competently and safely perform.

COMBINED CYCLE OPERATOR (6065)

Supports the efficient cost effective production of electric energy by operating and controlling power plant equipment. Monitors instrumentation to determine plant conditions. Performs actions necessary to keep the plant operating within prescribed limits. Respond quickly to abnormal plant conditions or requirements. Operating duties include inspection, preventative maintenance and repairs incidental to the performance of regular duties. Assist in the development and defining of overall operations policies and procedures. Operates and monitors turbines, generators, water treatment equipment and plant

auxiliary equipment. Maintain high personnel and equipment safety ad environmental compliance standards and practices. Cooperates with system dispatchers relative to load voltage changes, frequency and switch requirements, adjusting controls of generating equipment accordingly to operating conditions and synchronizes the equipment with the system; maintains daily log, a record of all dispatcher and trouble calls, and visitors records; maintains in a clean and orderly manner control room, all equipment and panels; informs relief fully on existing and preceding operating conditions of the plant and system; acts as part of overhaul crew during plant shutdown, or any emergency when necessary, may be required to perform any function in the plant. Inspects and operates plant auxiliary equipment. Must be familiar with trip functions and testing of all equipment as directed. Supplement maintenance by performing basic maintenance duties as trained. Employees will perform any and all tasks for which they are properly trained and can competently and safely perform.

LEAD PRODUCTION TECHNICIAN (6068)
In the absence of appropriate supervision and when directed, leads, assists, and works with other departmental personnel to ensure the efficient operations of related activities. May be required to develop schedules, direct work assignments, prepare job related reports, complete other administrative duties, function in a Journeyman capacity and perform other work as needed. May supervise contract workers performing work that the bargaining unit typically does. Employees will perform any and all tasks for which they are properly trained and can competently and safely perform.

LEAD COMBINED CYCLE OPERATOR (6066)
In the absence of appropriate supervision and when directed, leads, assists, and works with other departmental personnel to ensure the efficient operations of related activities. May be required to develop schedules, direct work assignments, prepare job related reports, complete other administrative duties, function in a Journeyman capacity and perform other work as needed. May supervise contract workers performing work that the bargaining unit typically does. Employees will perform any and all tasks for which they are properly trained and can competently and safely perform.

ATTACHMENT C – Working Hours

Maintenance

The normal work-week shall be defined as five consecutive eight hour days from Monday through Friday and a shift from Tuesday through Saturday. The hours shall be from 7 to 3:30 p.m. with a half hour unpaid lunch.
Shifts shall run from M-F and Tu-Sat on eight hour shifts to start. Other shifts may need to be negotiated as the need arises.

Operations

Operations shall follow a twelve-hour shift schedule with a start time of 6:00 a.m. and end time of 6:00 p.m. and the second shift will be from 6:00 p.m. to 6:00 a.m.. A Lead Combined Cycle Operator will work the day shift when not in a relief capacity.

Operations shall provide 24/7 coverage.

ATTACHMENT D – Staffing Process for filling vacancies

The company shall follow the following process when filling the vacancies:

Positions will be posted with the negotiated job descriptions and associated wages.

The company will establish skill set requirements for the new positions.

Interviews will be conducted for qualified employees. All things being equal, seniority will prevail.